

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA**

KIMBERLY D. CUSHENBERY-MILLER,

Plaintiff,

v.

**COMMISSIONER OF SOCIAL SECURITY
ADMINISTRATION,**

Defendant.

)
)
)
)
)
)
)
)
)
)

Case No. CIV-15-778-F

REPORT AND RECOMMENDATION

Plaintiff brings this action pursuant to 42 U.S.C. § 405(g) for judicial review of the final decision of the Commissioner of the Social Security Administration denying Plaintiff's application for benefits under the Social Security Act. United States District Judge Stephen P. Friot has referred this matter to the undersigned magistrate judge for initial proceedings consistent with 28 U.S.C. § 636(b)(1)(B)-(C). The Commissioner has answered and filed a transcript of the administrative record.

Currently before the Court is Plaintiff's Motion to Dismiss Without Prejudice. (ECF No. 16). Because Defendant has filed an Answer to the Complaint (ECF No. 10) and Plaintiff has not filed a stipulation of dismissal signed by both Plaintiff and Defendant, Plaintiff's Motion to Dismiss is governed by Fed. R. Civ. P. 41(a)(2). This rule authorizes the voluntary dismissal of a cause of action, but only "upon order of the court and upon such terms and conditions as the court deems proper." Fed. R. Civ. P. 41(a)(2). Generally, a dismissal under Rule 41(a)(2) is addressed to the sound discretion of the court and the motion is granted unless the opposing party will suffer legal prejudice.

See Ohlander v. Larson, 114 F.3d 1531, 1537 (10th Cir. 1997); *see also Clark v. Tansy*, 13 F.3d 1407, 1411 (10th Cir. 1993) (applying Rule 41(a)(2) to a Plaintiff's motion to voluntarily dismiss his habeas petition). Plaintiff moves the Court to enter an Order dismissing this case without prejudice. Defendant has not filed an objection. In that light, the undersigned recommends that Plaintiff's Motion to Dismiss (**ECF No. 16**) be **GRANTED** and the Complaint be dismissed without prejudice.

The parties are advised of their right to file specific written objections to this Report and Recommendation. 28 U.S.C. § 636; Fed. R. Civ. P. 72. Any such objections must be filed with Clerk of the District Court by **March 21, 2016**. The parties are further advised that failure to make timely objection to this Report and Recommendation waives the right to appellate review of the factual and legal issues addressed herein. *Casanova v. Ulibarri*, 595 F.3d 1120, 1123 (10th Cir. 2010).

This Report and Recommendation **DISPOSES OF ALL ISSUES** referred to the undersigned magistrate judge in this matter.

ENTERED on March 7, 2016.



SHON T. ERWIN
UNITED STATES MAGISTRATE JUDGE